LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 24 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 841

HERMAN SCHWABE, INCORPORATED,
PETITIONER,

v.

UNITED SHOE MACHINERY CORPORATION,
RESPONDENT.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

JAMES M. MALLOY
10 State Street
Boston 9, Massachusetts
Attorney for Petitioner

RICHARD A. SULLIVAN
RALPH WARREN SULLIVAN
MALLOY, SULLIVAN & MYERSON
Of counsel

Blanchard Printing Company, Boston, Mass. — Law Printers

In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 841

HERMAN SCHWABE, INCORPORATED,

PETITIONER,

v.

UNITED SHOE MACHINERY CORPORATION,

RESPONDENT.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

This Court denied the petition of Herman Schwabe, Incorporated for a Writ of Certiorari to the Court of Appeals for the Second Circuit on April 30, 1962.

The judgment of the Court of Appeals sought to be reviewed affirmed the action of the United States District Court for the Eastern District of New York in directing a jury verdict in favor of respondent and in entering a judgment *dismissing petitioner's complaint against respondent.*

Petitioner's complaint had charged respondent with monopolizing the interstate shoe machinery industry in

violation of Section 2 of the Sherman Act to petitioner's injury and damage. In that regard, petitioner sought to introduce a decree finding respondent guilty of such a monopolization entered in *United States* v. *United Shoe Machinery Corporation* (D. Mass., 1953) 110 F. Supp. 295, aff'd. 347 U.S. 521. Petitioner's proffer of the decree was denied by the District Court.

Although petitioner made several assignments of error concerning various rulings of the District Court, the Court of Appeals declined to rule on any save those relating to petitioner's theory of damages and the District Court's exclusion of evidence as to that issue. 297 F.2d 906, 908. It may, therefore, fairly be inferred that the Court of Appeals assumed respondent's monopolization and impact therefrom on petitioner. It is also fair to say that the Court of Appeals affirmed solely and entirely on the damage question.

It would seem to be inevitable that an active competitor, such as the record shows petitioner to be, would suffer damages in the face of a monopolization. By definition, a monopolization consists of the power to exclude coupled with either the exercise of that power or the intent to exercise it. *United States* v. *Griffith*, 334 U.S. 100. In *United States* v. *United Shoe Machinery Corporation*, 110 F. Supp. 295, 343, it was ruled that respondent herein exercised that power.

Be that as it may, petitioner was prevented by the District Court from making a proof of damages which met the tests favored by this Court in such cases as *Bigelow* v. *RKO Radio Pictures, Inc.* 327 U.S. 251, 264, 265.

Petitioner attempted to introduce a comparison between its sales of clicking machines to shoe manufacturers and its sale of the same machines to manufacturers of non-shoe products. This was a rational and fair procedure. The respondent monopolized the distribution of clicking

machines to shoe manufacturers; it did not monopolize the distribution of clicking machines to non-shoe manufacturers. It would have been proper for the jury to infer that absent United's monopolization, petitioner would have done as well with its clicking machine business in the shoe trade as it did in the outside trade. It would also have been fair for the jury to take one step further and to have concluded that petitioner would have done as well with the sale of its other machine types to the shoe trade as it did in clicker sales to the outside trade, if it had not been for respondent's monopolization.

When the Court of Appeals refused that approach to petitioner, it rendered a decision in direct conflict with *Richfield Oil Corp.* v. *Karseal Corp.* (C. A. 9, 1959) 271 F.2d 709, 713, 714.

More importantly for the purposes of this Petition for Rehearing, however, the decision of the Court of Appeals may prove to be in conflict with a decision about to be rendered by this Court in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, No. 304, October Term, 1961.

Petitioner has been advised that *Continental Ore* was argued before this Court on April 17, 1962. Through Potter's Service and beginning on April 23, 1962 petitioner has received and examined the briefs filed by the parties in that case. It has been noted that the respondents in *Continental Ore* have placed some reliance upon the opinion of the Court of Appeals in this *Schwab* matter. We also point out that both cases involve similar rulings on similar damage questions.

However, the most significant feature of *Continental Ore* so far as we are concerned is that there also the courts below refused to allow evidence as to the business done by the petitioner in an outside or non-monopolized field. (Petitioner's Reply Brief, 25, 26). We submit that the position taken on that score by the petitioner in *Continental Ore*

is a valid position. Nevertheless, we should point out that there the comparative evidence offered dealt with different products, vanadium and fluorspar.

In this case, petitioner offered a comparison between free and restricted sales of the very same product performing the same function in both cases, clicking machines.

We contend that petitioner here should be entitled to a rehearing on this case standing alone. Furthermore, if this Court should order a reversal in *Continental Ore*, then necessarily a Writ of Certiorari should issue in this case.

Respectfully submitted,

James M. Malloy
10 State Street
Boston 9, Massachusetts
Attorney for Petitioner

Richard A. Sullivan
Ralph Warren Sullivan
Mallory, Sullivan & Myerson
Of counsel

Certificate

I, James M. Malloy, one of counsel for petitioner, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay; and that the petition is restricted to a substantial ground available to petitioner but not previously presented and to an intervening circumstance of substantial effect.

(s) James M. Malloy
Attorney for Petitioner